TelAlaska/ASTAC, and United would have the Commission leave this matter in the hands of the APUC. In fact, however, immediate preemption is warranted.

A. There is Nothing Left for the APUC to Study Under Section 253

First, the APUC has had the opportunity "to rule on whether to enforce or set aside 3 AAC 52.355"[54] for some time now. It has been more than two years since Section 253 became the law of the land, more than one and one-half years since GCI first asked the APUC to declare Section 52.355 unenforceable, and more than one year since GCI formally petitioned the APUC for a declaratory ruling that the regulation is preempted. In that time, the APUC has reviewed written analyses and oral testimony from its staff and from the Alaska Attorney General's office concluding that Section 52.355 cannot be sustained under Section 253, it has considered two separate rounds of briefs and reply briefs on the matter, and it has presided over one full oral argument. Still, though, the APUC has voted twice to continue studying the effects of competition in the locations covered by the regulation, declining each time to eliminate Section 52.355.[55]

While GCI supports the APUC's thoughtful consideration of the issues presented by competitive telecommunications markets,

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[54] TelAlaska/ASTAC Comments at 13.

[55] See APUC August 27, 1997, Public Meeting, Transcript at 29, 34-36, 39 (attached to GCI's Petition as EXHIBIT E); APUC December 17, 1997, Public Meeting, Transcript at 22-23 ("APUC December 17 Public Meeting Transcript") (attached to GCI's Petition as EXHIBIT F).

there is simply nothing left to "study" regarding the continued enforceability of Section 52.355 under Section 253 of the Communications Act. Even assuming that an outright ban on competitive facilities could ever be justified to address the universal service and public safety concerns expressed by the commenters, Section 52.355 is not "competitively neutral,"[56] so it still could not be sustained under Section 253(b). Since public policy justifications will not save the regulation from preemption, continuing to study the public policy effects of competition in the locations covered by Section 52.355 does not bear on the legal validity and continued enforceability of the regulation under federal law. The APUC knows all it needs to know to declare Section 52.355 unenforceable without delay.

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[56] To be certain, this fact was not lost on the APUC. As GCI noted in its Petition, the staff of the APUC prepared a memorandum concluding that "3 AAC 52.355 is not competitively neutral (a requirement of 253(b)) as only Alascom may build facilities while all other carriers' services are restricted to resale in select areas of the state." Memorandum of Lori Kenyon, Common Carrier Specialist, APUC, Docket R-97-1, Aug. 22, 1997, at 3 (attached to GCI's Petition as EXHIBIT C). The Alaska Attorney General's office also prepared a memorandum in which it wrote, "The regulation on its face allows one carrier to construct facilities and use them and therefore the regulation cannot be saved by Section 253(b)." Memorandum of Ron Zobel, Assistant Attorney General, State of Alaska, Department of Law, Aug. 22, 1997, at 1 (attached to GCI's Petition as EXHIBIT D). And APUC Commissioner Ornquist — who dissented from the APUC's Comments in this proceeding — made clear to the APUC on December 17, 1997, that Section 52.355 was not competitively neutral. APUC December 17 Public Meeting Transcript at 24-25.

B. The APUC Will Not Act Soon to Remove Section 52.355

Despite this clear legal record, it is also plain that the APUC will not act soon to remove Section 52.355. Though the APUC proclaims its intent to work quickly on the matter of reviewing the policy implications of competition, the details of the APUC's study will take some time to develop. For example, the APUC writes that it "has opened a docket to investigate interexchange market structure issues, with resolution expected in the near future."[57] However, no such docket has been opened, and when one is, it will likely commence with a Notice of Inquiry ("NOI").[58] The process of moving from an NOI to effective regulation amendments takes more than one year and frequently more than two.[59] In addition, the APUC cites the fact of an early-1997 battery explosion at one of GCI's bush demonstration satellite earth stations and the discharge of hydrogen gas at another as evidence of the need for "service and safety standards."[60] Yet, the APUC has known about the two incidents at least since April

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[57] APUC Comments at 7.

[58] See id., Appendix 2 at 3 ("Staff recommends the Commission initiate a separate NOI to address interexchange market structure issues").

[59] For example, on July 24, 1996, the APUC issued an NOI to consider rules to implement the federal Telecommunications Act of 1996. That NOI lead to other NOI Dockets on access charges, universal service, and the local exchange market structure. The APUC has not issued proposed regulations in any of those Dockets. Once regulations are proposed, it will take six months or more before they become final.

[60] APUC Comments at 9.

15, 1997,[61] and it has not opened a proceeding to develop any such standards. To be certain, if the APUC truly was concerned that Section 52.355 would be preempted before it "had an opportunity to develop any necessary service and safety standards,"[62] it could have started to consider standards long ago. And, more importantly, the preemption of Section 52.355 will not affect the ability of the APUC to promulgate such standards in its discretion.

With regard to developing specific data about the effects of competition in the locations protected by Section 52.355, the APUC insists that "[k]ey information to resolve these issues is forthcoming. Both AT&T Alascom and GCI are required to file by March 31, 1998, reports regarding the costs and characteristics of facilities deployment in rural areas."[63] Due to the slow pace of interconnection with local exchange carriers ("LECs") in the bush, however, the information to be submitted by GCI on March 31 will not illuminate the costs and benefits of competition. When the APUC approved GCI's 50-site bush satellite communications demonstration project, it wrote, "The Commission acknowledges that the cooperation of the LECs in providing equal access, and coordinating with GCI's engineers to insure the best possible interconnection, is instrumental to the vitality of this

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[61] See id., Appendix 3 (GCI Report on Battery Safety Issues dated April 15, 1997).

[62] APUC Comments at 8-9.

[63] Id. at 7. See also id. at 16.

demonstration project."[64] Yet, on December 31, 1997,[65] only six of GCI's 50 bush earth station sites had equal access interconnection, thirty seven sites had only Feature Group B interconnection, and seven sites had no interconnection at all. Moreover, only seven sites were fully operational for all of 1997.

In short, though the record before the APUC is complete regarding the unenforceability of Section 52.355 under Section 253, it is not clear whether or when the APUC will act to eliminate the regulation. Indeed, following its study of the issues noted above, the APUC forecasts only that it "may ultimately revoke the very rule for which preemption is sought."[66] For more than two years, however, Section 52.355 has been outside the scope of permissible state telecommunications regulation. Yet, despite its many opportunities to do so, the APUC has failed to declare the regulation unenforceable, effectively deciding that Section 253 and the Telecommunications Act of 1996 do not apply to certain locations in Alaska.

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[64] Request by General Communication, Inc., for Waiver of 3 AAC 52.355(a) and Approval of a 50-Site Demonstration Project, Order Affirming Bench Order, Docket U-95-38(9), at 31 (APUC Dec. 8, 1995) (emphasis added).

[65] GCI's March 31 filing will include data from its demonstration project as of December 31, 1997.

[66] APUC Comments at 16. See also id. at 16 ("If the Commission takes no action on the GCI petition, the issues for which Commission review is sought may well be resolved by the APUC").

This is underscored in the APUC's Comments here. In a telling final passage, the APUC undertakes to distinguish the facts of this case from the Commission's decision in Public Utility Commission of Texas. Among other things, the APUC argues that "[t]he Texas case involved local exchange market issues while Alaska's involves interexchange market issues" and that the Texas decision was a function of the "'1996 Act's explicit goal of opening local markets to competition.'"[67] According to the APUC, "Neither §251 nor the above interpretation of §253 as reached in the Texas case is applicable to the GCI preemption issue dealing with interexchange markets."[68]

In fact, however, Section 253(a) forbids any State regulation that prohibits or has the effect of prohibiting the ability of "any entity to provide any interstate or intrastate telecommunications service."[69] Section 253 makes no distinction between interexchange and local exchange services, and it applies equally to state action — or inaction — that affects either market segment. Thus, directly applicable to this case is the Commission's clear statement in Public Utility Commission of Texas that "section 253(a) of the Act bars state or local governments from restricting the means by which a new entrant

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[67] Id. at 15-16 (quoting Public Utility Commission of Texas at ¶ 41).

[68] APUC Comments at 16.

[69] 47 U.S.C. § 253(a) (emphasis added).

chooses to provide telecommunications services."[70] On this basis, the Commission confirmed that a restriction on the ability of any entity to provide facilities-based telecommunications services violates the terms of Section 253(a).[71]

At bottom, Section 52.355 is simply inconsistent with Section 253 of the Communications Act. Notwithstanding the APUC's arguments to the contrary, Congress has made the national policy determination that competitive entry is to be safeguarded for all segments of the telecommunications industry, and this includes the right of a company to use its own facilities to provide intrastate long distance services. The time has passed for competitively-slanted state regulations such as Section 52.355. Alerted to this, the APUC has had several opportunities in the last two years to declare Section 52.355 unenforceable under Section 253, but it pledges only to study the issue. On this record, it is clear that the APUC will not act soon to remove Section 52.355. Accordingly, to give the Telecommunications Act of 1996 full and immediate effect in Alaska, GCI urges the Commission to declare Section 52.355 to be unenforceable without delay.

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[70] Public Utility Commission of Texas at ¶ 128 (footnote omitted).

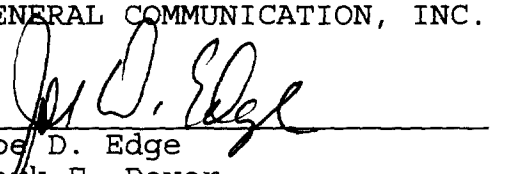
[71] Id. at ¶¶ 128-29.

VI. CONCLUSION

For these reasons, GCI urges the Commission to preempt the enforcement of Section 52.355 to the extent that it prohibits non-incumbent carriers from constructing and operating facilities to provide intrastate interexchange services in certain locations in the State of Alaska.

Respectfully submitted,

GENERAL COMMUNICATION, INC.

By: 

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March 16, 1998

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